Petitioner's Reply Brief

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 69

SAFEWAY STORES, INCORPORATED,
a corporation

Petitioner,

vs.

HARRY V. VANCE, Trustee in
Bankruptcy for
FRANK MELVIN THOMPSON, BANKRUPT,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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PETITIONER'S REPLY BRIEF

In Part III of his brief (pp. 23-29), respondent contends that the express specification of certain antitrust laws in Section 1 of the Clayton Act, 38 Stat. 370, was not intended to exclude later enactments in the antitrust field. Petitioner submits this brief in answer to such contention.

In Section 1 of the Clayton Act the following Acts are defined as "antitrust laws":

1. The Sherman Act (Act of July 2, 1890).

2. Portions of the Wilson Tariff Act (Act of August 27, 1894).

3. The Act amending the Wilson Tariff Act (Act of February 12, 1913), and

4. The Clayton Act ("this Act").

Petitioner contends that the specific mention of these acts necessarily excludes all other acts not enumerated, including the Federal Trade Commission Act (15 U.S.C., Sec. 41 *et seq.*) and all portions of the Robinson-Patman Act not amendatory of the Clayton Act.

All of the courts passing upon this question to date have adopted petitioner's view and have held that the enumeration of specific acts in Section 1 of the Clayton Act excludes all other acts not so enumerated therein. This includes both the District Court (R. 14-15) and the court below (R. 31) as well as the Court of Appeals for the Seventh Circuit in *Nashville Milk Co.* v. *Carnation Co.*, 238 F.2d 86, 88 (1956) (R. 37), and the opinion in *Balian Ice Cream Co.* v. *Arden Farms Co.*, 94 F. Supp. 796, 798 (S.D. Cal., 1950).

The very fact that no court to date has adopted respondent's contention is persuasive evidence of its lack of merit.

However, further evidence of the absence of merit in respondent's position is found in the fact that Congress has, since the enactment of Section 1 of the Clayton Act in 1914, uniformly treated Section 1's enumeration of certain antitrust laws as being exclusive of all other antitrust laws. By way of example the following acts may be referred to:

In Section 29 of the Marine Insurance Ass'n Act (41 Stat. 1000, 46 U.S.C., Sec. 885) Congress treated the definition of antitrust laws contained in Section 1 of the Clayton Act as exclusive, stating:

> "(b) Nothing contained in the 'antitrust laws' *as designated in* section 1 of an Act entitled * * * [the Clayton Act] shall be construed as declaring illegal an association entered into by marine insurance companies for the following purposes * * *" (Emphasis added.)

In Sec. 414 of the Civil Aeronautics Act (52 Stat. 1004, 49 U.S.C., Sec. 494) Congress also treated the designation of antitrust laws in Section 1 of the Clayton Act as exclusive, providing:

> "Sec. 414. Any person affected by any order made under sections 408, 409, or 412 of this Act shall be, and is hereby, relieved from the operations of the 'antitrust laws,' *as designated in* section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, and of all other restraints or prohibitions made by, or imposed under, authority of law, in so far as may be necessary to enable such person to do anything authorized, approved, or required by such order." (Emphasis added.)

In the Bulwinkle Act (62 Stat. 472, 49 U.S.C., Sec. 5b) Congress again incorporated the definition of the antitrust laws as contained in Section 1 of the Clayton Act as follows:

> "(B) The term 'antitrust laws' *has the meaning assigned* to such term in Section one of the Act entitled * * * [the Clayton Act]." (Emphasis added.)

Furthermore, when Congress desires to refer to acts not enumerated in Section 1 of the Clayton Act as antitrust laws

it expressly enumerates such other acts without reference to the exclusive enumeration found in Section 1 of the Clayton Act. Thus in Section 207 of the Federal Property and Administrative Services Act of 1949, 63 Stat. 391, the term "antitrust laws" is defined as follows:

> "As used in this section the term 'antitrust laws' includes the Act of July 2, 1890 (ch. 647, 26 Stat. 209) [Sherman Act] as amended; the Act of October 15, 1914 (ch. 323, 38 Stat. 730) [Clayton Act] as amended; the Federal Trade Commission Act (38 Stat. 717), as amended; and sections 73 and 74 of the Act of August 27, 1894 (28 Stat. 570) [Wilson Tariff Act] as amended."

In the McCarran Insurance Act (59 Stat. 39, 15 U.S.C., Sec. 1013) Congress again refrained from referring to Section 1 of the Clayton Act when it desired to include antitrust laws (including the Robinson-Patman Act) other than those expressly enumerated in Section 1, stating:

> "Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Anti-discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof."

It is highly significant that Congress in enacting the McCarran Act distinguished between the Robinson-Patman Act and the Clayton Act, treating them as separate statutes and not as though the Robinson-Patman Act amended the Clayton Act or was a part thereof (except, of course, as to Section 1 of the Robinson-Patman Act which does amend the Clayton Act).

Furthermore, if respondent's contention is sound, all acts of Congress in the general "antitrust" field would fall

within the definition of Section 1, and the treble damage remedy would be available for their violation. It would not be necessary that this remedy be specifically provided by Congress in any such act. However, in the Revenue Act of 1916, 39 Stat. 795, 15 U.S.C. 72, Congress prohibited the importation into the United States, and the sale therein, of articles at substantially less than actual market value with the intent of injuring industry in the United States or with the intent of restraining or monopolizing any part of trade or commerce. This is certainly an "antitrust law".

That Congress considered the definition of "antitrust laws" in Section 1 of the Clayton Act to be exclusive is shown by the fact that the treble damage remedy was specifically incorporated in these provisions of the Revenue Act of 1916. Under respondent's theory, this would not have been necessary, since the definition in Section 1 of the Clayton Act would have embraced these provisions so as to make the treble damage provisions available under Section 4 of the Clayton Act. Obviously, Congress did not so consider it. The only justification for specifically incorporating the treble damage remedy in these provisions of the Revenue Act of 1916 is that Congress believed that the definition of the "antitrust laws" in Section 1 of the Clayton Act was exclusive and that no treble damage remedy would exist for violation of these provisions of the Revenue Act of 1916 unless a specific provision therefor was made.

Nor did Congress, in defining "antitrust laws" in Section 1 of the Clayton Act, add the phrase "and other Acts of Congress amending or supplementing said Acts" or words of like import. When Congress desires that a definition have a non-exclusive meaning it incorporates such language in the statute, as was done in the Panama Canal Act, 37 Stat. 567, 15 U.S.C., Sec. 31 ("and other Acts of

Congress amending or supplementing said Acts"), in the Expediting Act, 32 Stat. 823, 15 U.S.C., Sec. 28 ("or any other Acts having a like purpose that hereafter may be enacted"), in the Shipping Act of 1916, 30 Stat. 733, 46 U.S.C., Sec. 14 ("and amendments and Acts supplementary thereto"), in the Communications Act of 1934, 48 Stat. 1087, 47 U.S.C., Sec. 313 ("all laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts or agreements in restraint of trade"), and in the Civil Aeronautics Act, 52 Stat. 1004, 49 U.S.C., Sec. 494 ("and of all other restraints or provisions made by, or imposed under, authority of law * * *").

We believe that the above statutes referred to by example make it abundantly clear that Congress intended to state an exclusive definition of "antitrust laws" in Section 1 of the Clayton Act. Respondent's citation of authorities relating to other acts such as the Federal Farm Loan Act of 1916 (39 Stat. 360, 380), and the Revenue Act of 1936 (44 Stat. 9, 17) (Respondent's Brief, pp. 23-6), clearly have no relevance to Section 1 of the Clayton Act; nor does respondent's extensive quotation from the legislative history of the Clayton Act (Br. pp. 26-9) demonstrate that Congress did not intend Section 1 of the Clayton Act to state an exclusive enumeration of the antitrust laws for which the treble damage remedy was provided in Section 4 of the Clayton Act.

CONCLUSION.

For the reasons stated herein and stated in its main brief, petitioner respectfully submits that Section 1 of the Clayton Act contains an exclusive enumeration of the antitrust laws for which private civil remedy lies and since Section 3 of the Robinson-Patman Act is not one of the

antitrust laws so enumerated, it not being a part of the Clayton Act, petitioner asks that the judgment of the court below be reversed.

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